

AUG 10 2005

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No.	NC-04-1311-SBrP
)		
WILLIAM JEFFREY GILLIAM,)	Bk.No.	04-42153
)		
Debtor.)		
)		
WILLIAM JEFFREY GILLIAM,)		
)		
Appellant.)	M E M O R A N D U M ¹	
)		
)		

Argued and Submitted on
March 24, 2005 at San Francisco, California

Filed - August 10, 2005

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Randall J. Newsome, Chief Bankruptcy Judge, Presiding

Before: SMITH, BARR² AND PERRIS, Bankruptcy Judges

¹This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

²Hon. James N. Barr, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 This appeal is from a final order dismissing the chapter 11
2 case of debtor, William Jeffrey Gilliam, for cause. We AFFIRM.

3 FACTS

4 Debtor filed this chapter 11 bankruptcy on April 19, 2004.
5 The voluntary petition form he completed directs petitioners to
6 list all "prior bankruptcy cases filed within the last 6 years"
7 and "pending bankruptcy cases filed by any spouse, partner or
8 affiliate of this debtor." At the time Debtor filed his
9 petition, he had two related chapter 7 cases pending in South
10 Carolina. He disclosed one of the pending cases, involving an
11 affiliate (In re Marine Energy Systems Corporation, Case No. 97-
12 01929B ("MESC case")) but did not disclose his individual case,
13 styled In re William J. Gilliam, Case No. 96-76468B, filed eight
14 years earlier in 1996³ ("1996 case"). Though he had received a
15 discharge in the latter case in 1999, it remained open at the
16 time he commenced the present case.⁴ Debtor also did not
17 disclose that he had filed a chapter 13 case in the Northern
18 District of California, Santa Rosa Division, on July 31, 2000,
19 Case No. 00-11820 ("Santa Rosa case"). He claims that, for
20 various reasons, he did not believe he had to list the cases on
21 his current petition.

22 Debtor filed the present case the same morning a hearing was
23 scheduled to be heard in a state court action against him filed
24

25 ³Debtor had filed a chapter 11 case in 1996 in the District
26 of Delaware, which was later transferred to South Carolina and,
27 in 1998, converted to a chapter 7.

28 ⁴The two cases are sometimes referred to herein collectively
as the "South Carolina cases."

1 by his former domestic partner, Joan Cooper. Cooper had filed a
2 motion in that case alleging, among other things, that Debtor was
3 a vexatious litigant. The hearing was scheduled to take place at
4 8:30 a.m. According to Debtor, he notified both Cooper and the
5 state court that he had filed bankruptcy prior to the
6 commencement of the hearing, but the state court conducted the
7 hearing anyway and entered a default judgment against him.⁵

8 Debtor claims that he first deposited his petition into the
9 court's drop box at 7:19 a.m. on April 19, and that, while he was
10 physically present at 9:00 a.m. to file the petition and pay the
11 filing fee, administrative delays imposed by the Clerk of the
12 Court prevented it from being filed until later. Because the
13 record on appeal does not include a conformed copy of the
14 petition bearing the clerk's time-stamp, there is no evidence of
15 what time the petition was actually filed or whether it was filed

17
18 ⁵Debtor commenced an adversary proceeding against Judge
19 Laurence Sawyer, the state court judge, and the two creditors
20 involved in the Cooper action, seeking, among other things, to
21 set aside the default judgment as a violation of the automatic
22 stay. That case was dismissed with prejudice by the bankruptcy
23 court.

24 Judge Sawyer's ex parte motion seeking dismissal of the
25 adversary proceeding against him states that the judge had
26 entered his tentative ruling on April 16, the business day prior
27 to Gilliam's petition filing date. In his tentative ruling, the
28 judge refused Gilliam's request for leave to file cross-
complaints and found him to be a vexatious litigant. Gilliam's
attorney requested a hearing, without which the tentative ruling
would automatically have become the order of the court. Neither
Gilliam nor his attorney attended the 8:30 a.m. hearing which
took place on April 19. The panel obtained a copy of the ex
parte motion from the bankruptcy court's electronic docket for
Adversary No. 04-4139, available through PACER (Public Access to
Court Electronic Records).

1 before the state court hearing.⁶

2 According to Debtor, on April 22, 2004, Cooper sought and
3 obtained an affirmation from the state court that the April 19
4 hearing had not violated the automatic stay.⁷

5 On April 28, Debtor filed a motion seeking authority from
6 the bankruptcy court to execute a settlement agreement involving
7 Debtor, creditors in the MESC case and the MESC chapter 7
8 trustee. Opposition to the motion was posed by one of Debtor's
9 former spouses, Cathleen Gilliam, as well as by General Dynamics
10 Corp ("GD"). Following a flurry of motions and responsive
11 pleadings on issues ranging from relief from stay to the
12 employment of counsel, the court held a hearing on May 27.
13 Thereafter, the court issued an order to show cause why the case
14 should not be dismissed with prejudice ("OSC"), and set a hearing
15 to address that and various other pending motions for June 9.
16 (Case No. 04-42153, Docket entries of 05/28/2004, 06/09/2004.)

17 In response to the OSC, Debtor filed a 37-page opposition
18 brief the day before the hearing, arguing that there was no cause
19 for dismissal under §§ 1112(b) and § 305(a). Among other things,
20 Debtor advised that he had amended his petition to list the Santa

21
22 ⁶Debtor apparently admits that the time-stamp on his
23 petition would reflect a time later than 9 a.m., but attributes
24 this to administrative delays imposed by the court clerk.

25 In Judge Sawyer's ex parte motion to have the adversary case
26 against him dismissed, his attorney states that Debtor's petition
27 was not time-stamped until 11:00 a.m. on April 19.

28 ⁷The Judge's ex parte motion also states that because the
Cooper action was a matter originally commenced in the area of
domestic violence stay-away injunctions, the analysis of whether
an automatic stay applies may be different.

1 Rosa case and that he had not initially listed the 1996 case
2 based on his belief that the case had been consolidated with the
3 MESC case. All in all, Debtor maintained that his failure to
4 disclose all related bankruptcy cases was inadvertent and that
5 dismissal of the current case would not be in the best interest
6 of creditors, particularly since he had filed a disclosure
7 statement and plan.

8 The United States Trustee supported dismissal on the grounds
9 that the timing of the filing suggested an improper intent to
10 thwart the state court proceedings, Debtor failed to disclose all
11 related bankruptcy cases, his debt consisted primarily of
12 delinquent personal income taxes, and Debtor's ability to fund a
13 plan was highly speculative.⁸

14 At the June 9 hearing, the court ordered that the case be
15 dismissed with prejudice pursuant to §105(a) and §109(g),
16 ordering Debtor not to file another bankruptcy petition for 180
17 days under penalty of sanctions of not less than \$50,000.00.
18 This timely appeal followed.

19 JURISDICTION

20 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
21 and § 157(b)(1) and (b)(2). We have jurisdiction under 28 U.S.C.
22 § 158(b)(1).

23 ISSUES

- 24 1. Whether the bankruptcy court abused its discretion in
25 dismissing Debtor's case for cause.

26
27 ⁸The United States Trustee has informed the Clerk that he is
28 not a party to this appeal and that he did not intend to
participate in the appeal.

2. Whether the court erred in finding that Debtor made false and misleading statements under penalty of perjury.
3. Whether the court erred in prohibiting Debtor from filing another bankruptcy petition for 180 days.
4. Whether the court erred in dismissing an adversary proceeding after Debtor filed the Notice of Appeal commencing this appeal.

STANDARD OF REVIEW

The bankruptcy court's decision to dismiss a case for cause under § 1112(b) is reviewed for abuse of discretion. St. Paul Self Storage Ltd. Partnership v. The Port Authority of the City of St. Paul (In re St. Paul Self Storage), 185 B.R. 580, 582 (9th Cir. BAP 1995). Findings of bad faith are reviewed for clear error. Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake had been committed. In re Leavitt, 209 B.R. 935, 938 (9th Cir. BAP 1997) (citation omitted). If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced that it would have weighed the evidence differently as a trier of fact. Id.

The issue of statutory construction involving the proper application of §105(a) and § 109(g) is also before the panel. Legal issues such as interpretation of statutes and rules are reviewed de novo. Arnold v. Gill (In re Arnold), 252 B.R. 778,

1 784 (9th Cir. BAP 2000); In re Carty, 149 B.R. 601, 602 (9th Cir.
2 BAP 1993).

3 DISCUSSION

4 A. Dismissal of Debtor's Case.

5 The court dismissed Debtor's case for cause on its own
6 motion⁹ on the grounds that Debtor had willfully omitted both a
7 prior bankruptcy case and a pending chapter 7 case, used the
8 bankruptcy proceeding as a litigation tactic, and filed the case
9 with no reasonable basis or prospect of reorganizing.

10 Under § 1112(b)¹⁰, bankruptcy courts have broad discretion

11
12 ⁹Section 105(a) makes clear the court's power to act *sua*
13 *sponte* where no party in interest or the United States trustee
14 has filed a motion to dismiss a bankruptcy case. In re Greene,
127 B.R. 805, 807-808 (Bankr. N.D. Ohio 1991); see also In re
Meints, 222 B.R. 870, 871-72 (D. Neb. 1998).

15 ¹⁰Section 1112(b) provides in relevant part
16 Conversion or dismissal
17 (b) . . . the court may convert a case under this chapter. . .
18 to a case under chapter 7. . . or may dismiss a case under this
chapter. . . whichever is in the best interest of creditors and
the estate, for cause, including--
19 (1) continuing loss to or diminution of the estate and
absence of a reasonable likelihood of rehabilitation;
20 (2) inability to effectuate a plan;
21 (3) unreasonable delay by the debtor that is prejudicial to
creditors;
22 (4) failure to propose a plan under section 1121 of this
title . . . within any time fixed by the court;
23 (5) denial of confirmation of every proposed plan and
denial of a request made for additional time for filing
24 another plan or a modification of a plan;
25 (6) revocation of an order of confirmation under section
1144 of this title. . . and denial of confirmation of
26 another plan or a modified plan under section 1129 of
this title. . . ;
27 (7) inability to effectuate substantial consummation of a
confirmed plan;
28 (8) material default by the debtor with respect to a
confirmed plan;

(continued...)

1 to convert or dismiss a chapter 11 case for cause shown. Lack of
2 good faith in filing the case may be cause for dismissal. See,
3 In re Little Creek Dev. Co., 779 F.2d 1068, 1072 (5th Cir. 1986).
4 "The test [of good faith] is whether a debtor is attempting to
5 unreasonably deter and harass creditors or attempting to affect a
6 speedy, efficient reorganization on a feasible basis." In re
7 Marsch, 36 F.3d at 828. "The existence of good faith depends on
8 an amalgam of factors and not upon a specific fact." In re
9 Arnold, 806 F.2d 937, 939 (9th Cir. 1986). The determination
10 requires a case-by-case assessment of multiple factors, taking
11 into account the circumstances of each case. United Enters, Ltd.
12 v. ACI Sunbow, LLC (In re ACI Sunbow, LLC), 206 B.R. 213, 219
13 (Bankr. S.D. Cal. 1997). While the court's discretion is not
14 completely unfettered, the court is not required to give
15 exhaustive reasons for its decision. In re Koerner, 800 F.2d
16 1358, 1368 (5th Cir. 1986).

17 There is no bright line, talismanic number of factors which
18 must exist to find bad faith; the weight of any given factor
19 depends on the facts and circumstances of the case. See, Laguna
20 Assocs. Ltd. Partnership v. Aetna Casualty & Sur. Co. (In re
21 Laguna Assocs. Ltd. Partnership), 30 F.3d 734, 738 (6th Cir.
22 1994).

23 The bankruptcy court listed three independent grounds for
24 dismissing Debtor's case. Debtor argues on appeal that the court

25
26 ¹⁰(...continued)

27 (9) termination of a plan by reason of the occurrence of a
condition specified in the plan; or

28 (10) nonpayment of any fees or charges required under
chapter 123 of title 28. . .

1 abused its discretion when it dismissed his case, *sua sponte*,
2 because the court failed to apply the "totality of circumstances"
3 test. Specifically, Debtor claims that the court erred in
4 finding that he willfully omitted information concerning prior
5 bankruptcies from the voluntary petition, attempted to use
6 bankruptcy as a 'mere litigation tactic' and submitted schedules
7 and statement of financial affairs containing false and
8 misleading information. On all counts, we disagree.

9 None of the arguments Debtor offers on appeal persuades us
10 that the court erred in finding that he filed the petition in bad
11 faith or abused its discretion in dismissing his case.¹¹
12 We agree with the court's findings that, under the circumstances
13 of this case, Debtor's actions lead to the conclusion that the
14 petition was not filed in good faith and should be dismissed.

15 1. Failure to List Prior Cases.

16 The first, and perhaps most important, basis for the court's
17 ruling was its finding that Debtor filed the bankruptcy petition
18 in bad faith, as evidenced by his failure to disclose two prior
19 bankruptcy cases, i.e., the Santa Rosa and 1996 cases. Indeed,
20 Debtor initially listed only the pending bankruptcy case of his
21 corporate affiliate, MESC.

22 According to Debtor, the court erroneously failed to
23 consider the later amendment disclosing the Santa Rosa case which
24

25 ¹¹Some of Debtor's arguments are difficult to follow. For
26 example, Debtor claims that he presented unrefuted evidence that
27 he has spent considerable sums of money overcoming fraudulently
28 obtained state court orders and judgments involving Cooper and
GD, but he fails to explain how this is relevant to the issue of
the dismissal.

1 he filed prior to the OSC hearing. Debtor's explanation was that
2 he initially omitted it because he believed the case was
3 irrelevant since it had been dismissed. The court found his
4 explanation to be "preposterous," noting that since Debtor had
5 attended law school, he should have known that questions answered
6 under penalty of perjury must be accurately and fully answered,
7 regardless of their relevancy.

8 The petition form Debtor completed directed him to list all
9 "prior bankruptcy cases filed within the last 6 years." The
10 Santa Rosa case clearly should have been listed on Debtor's
11 petition in the first instance. That Debtor cured the error in
12 his amended petition helps his argument. However, we do not find
13 that it was clearly erroneous for the court to view the initial
14 omission as evidence of bad faith, especially since the
15 correction was not made until after the OSC was issued and,
16 further, in light of Debtor's failure to also list his 1996 case,
17 a case that was still pending and active in South Carolina.

18 Debtor claimed that he omitted the 1996 case because he
19 believed it had been "effectively consolidated" with the MESC
20 case which he did list on his petition. On appeal, as proof that
21 these cases were consolidated, Debtor points to colloquy from a
22 hearing in one of the South Carolina cases where the parties
23 discuss the idea of having one trustee administering the claims
24 in both of Debtor's South Carolina cases.

25 The bankruptcy court was not convinced by Debtor's argument
26 and noted that, even in his amended petition, Debtor again
27 suspiciously omitted his individual chapter 7 case still pending
28 in South Carolina. The court determined that Debtor was

1 attempting to "finesse" that case by claiming it had been
2 consolidated with the MESC case.

3 In the court's view, the omission of the South Carolina case
4 was particularly egregious because Debtor had every reason to
5 conceal the fact that a chapter 7 trustee had control of his 1996
6 financial affairs and property, including the settlement Debtor
7 is seeking leave to enter into from this Court. For these
8 reasons, the court found Debtor's omission was willful and held
9 that on this ground alone, the court was justified in dismissing
10 the case with prejudice.

11 Though not for the reasons articulated by Debtor, it is not
12 clear that Debtor's omission of the 1996 case was as egregious as
13 the court found it to be. The petition form required Debtor to
14 list prior cases "filed within the last 6 years." Debtor's case
15 was filed eight years before the present case and converted from
16 a chapter 7 to a chapter 11 just over six years before the
17 current filing and, thus, was not technically "within in the last
18 6 years." To be sure, in the interest of full disclosure, Debtor
19 should have disclosed the 1996 case. However, since the
20 disclosure was technically not required, we disagree with the
21 court's determination that the omission was willful and that, on
22 this ground alone, the court was justified in dismissing the case
23 with prejudice.

24 On the whole, however, we do not find that the court's
25 conclusion - that Debtor's omissions were evidence of bad faith -
26 is clearly erroneous. Even if we may have weighed the evidence
27 differently, the inferences drawn by the court from the evidence
28 are plausible in light of the record viewed in its entirety. The

1 court was presented with a debtor who had three prior or on-going
2 bankruptcy cases, but who only initially disclosed one of those
3 cases when filing this petition, his fourth in less than eight
4 years. Additionally, Debtor failed to disclose a case filed
5 within the prior six years, the explanation for which the court
6 reasonably found implausible, and further failed to disclose
7 another actively ongoing case, albeit filed more than six years
8 earlier.

9 2. Litigation Tactic.

10 As an additional and independent ground for dismissal, the
11 court found that Debtor filed his petition as a litigation tactic
12 against a host of pending lawsuits brought by or against him,
13 involving various domestic partners, spouses and children.
14 Debtor conceded that one of his motives for filing his petition
15 was to halt a hearing scheduled to take place in the Cooper state
16 court case. The court noted that the Cooper case involved the
17 same set of circumstances that was the subject of another federal
18 court suit brought by Debtor, Gilliam v. Sonoma County, et al.,
19 No. C-02-3382, which was ultimately dismissed with prejudice,
20 attorney's fees and costs being awarded against Debtor in the
21 amount of \$34,553. In that case, in response to Debtor's motions
22 for reconsideration and recusal, the court filed a lengthy
23 opinion warning Debtor of further sanctions and condemnation as a
24 vexatious litigant, if he persisted.

25 The court also found noteworthy that Debtor filed this
26 petition shortly after GD had obtained a writ of attachment in
27 the South Carolina cases as to all of Debtor's property. The
28 court concluded that Debtor was attempting to use the bankruptcy

1 as both a shield and a sword in his various disputes.

2 On appeal, while admitting that obtaining a stay in the
3 state court proceedings was one reason for filing his petition,
4 Debtor contends that there were other reasons he filed his
5 petition when he did. Specifically, Debtor claims that he filed
6 this petition to 1) regain possession of his good name, which was
7 "wrongfully taken from him in his July 1996 chapter 11
8 bankruptcy"; 2) clear up a "dilemma" involving a settlement in
9 the South Carolina cases, the GD writ of attachment against his
10 interest in MESC case settlement proceeds, and a \$5.2 million
11 claim asserted by the IRS; and 3) "clean up" his credit rating.

12 By all accounts, the debts in this case consist primarily of
13 delinquent personal income taxes allegedly owed by Debtor. He
14 states that the IRS filed a proof of claim in this case asserting
15 the right to collect taxes that were discharged in his 1996 case.
16 He also contends that the IRS claim is in error and believes that
17 the IRS claims should be adjudicated in the instant bankruptcy
18 case, even though the matter is currently before the bankruptcy
19 court in South Carolina. The United States Trustee has indicated
20 that the trustee in the 1996 case has not objected to claims
21 filed by the IRS in that case and that he intends to pay at least
22 a portion of the claims from proceeds of the MESC case
23 settlement. The trustee apparently disputed Debtor's assertion
24 that he stands to receive 20% of the proceeds under the
25 settlement agreement.

26 Whether Debtor is seeking a tactical advantage in the Cooper
27 state court case, or in the South Carolina cases, makes little
28 difference. "It constitutes bad faith to file bankruptcy to

1 impede, delay, forum shop, or obtain a tactical advantage
2 regarding litigation ongoing in a nonbankruptcy forum - whether
3 that nonbankruptcy forum is a state court or a federal court. In
4 re Silberkraus, 253 B.R. 890, 905 (C.D. Cal. 2000) citing In re
5 SGL Carbon Corp., 200 F.3d 154 (3d Cir. 1999) (bad faith for
6 debtor to file bankruptcy to seek to gain a tactical litigation
7 advantage in pending antitrust litigation); In re Start the
8 engines, Inc., 219 B.R. 264 (C.D. Cal. 1998) (bankruptcy filed in
9 bad faith because petition filed for the improper purpose of
10 delaying a state court action); In re St. Paul Self Storage, 185
11 B.R. 580 (bad faith for debtor to file bankruptcy one day prior
12 to a hearing on a creditor's discovery motion in state court
13 litigation revolving around a lease that was allegedly owned by
14 debtor); see also, In re Little Creek Dev. Co., 779 F.2d 1068
15 (the seminal bad faith case, which opined, inter alia, that it is
16 bad faith to file bankruptcy as a follow on to state court
17 litigation).

18 Even accepting Debtor's stated reasons for filing this
19 petition, it is clear that he was, in large part, attempting to
20 circumvent proceedings which are on-going in both the state court
21 and in the South Carolina cases. Therefore, in our view, the
22 court did not err in finding that Debtor filed his petition as a
23 litigation tactic.

24 3. Debtor has no Business or Means of Repaying his Debt.

25 As a third ground for dismissal, the court determined that
26 Debtor was not engaged in business and had no visible means of
27 repaying even a fraction of his debt. Notwithstanding Debtor's
28 filing of a plan and disclosure statement the day before the

1 hearing, the court found that there was no reasonable basis for
2 concluding that Debtor had any prospects of reorganizing under
3 chapter 11.

4 Debtor listed \$38,000 in assets and some \$7,000,000 in debt,
5 including a lien held by the IRS for more than \$5.2 million.
6 Debtor does not dispute that he is not engaged in any business
7 which he is attempting to reorganize or from which he receives a
8 substantial income stream. He has no employees, relatively
9 little cash flow and no other apparent sources of income to
10 sustain a plan of reorganization. As the court found, though
11 Debtor claimed to make \$6,000 per month, he did not disclose the
12 source of those funds. The court also had difficulty accepting
13 Debtor's asserted expenditure of \$3,000 a month for food for just
14 himself, and over \$1,000 a month for clothing, finding that such
15 expenditures cast "fatal doubts upon his lifestyle, his financial
16 acuity, his honesty, or all three."

17 The court summarized the matter as follows:

18 In any event, Chapter 11 reorganizations are not
19 built on spending more money each month than is brought
20 in. Although he apparently pins his hope of
21 reorganizing upon his receipt of some of the money from
22 the settlement I am asked to approve today, he provides
23 no basis for believing that the Chapter 7 trustee in
his South Carolina bankruptcy or the IRS or General
Dynamics or one his former wives don't already have a
superior claim to all or most of that recovery. In any
event, disputes over such funds should be resolved in
South Carolina, not here.

24 Transcript of Proceedings, June 9, 2004, p. 11.

25 As the court in Little Creek stated,

26 "Resort to the protection of the bankruptcy laws is not
27 proper under these circumstances because there is no
28 going concern to preserve, there are no employees to
protect, and there is no hope of rehabilitation, except
according to the debtor's 'terminal euphoria'".

1 779 F.2d at 1073.

2 With a few exceptions, not present here, the purpose of
3 chapter 11 reorganization is to assist financially distressed
4 businesses or individuals by providing them with breathing space
5 in which to return to a viable state. Winshall Settlor's Trust,
6 758 F.2d at 1137; see also, In re Dolton Lodge Trust No. 35188,
7 22 B.R. 918, 922 (Bankr. N.D. Ill. 1982); In re Ironsides, Inc.
8 34 Bankr. 337, 339 (Bankr. W.D. Ky. 1983) ("If there is not a
9 potentially viable business in place worthy of protection and
10 rehabilitation, the Chapter 11 effort has lost its *raison d'être*
11"). A petition may be dismissed pursuant to § 1112(b) to
12 prevent misuse of the chapter 11 remedy by debtors who are not
13 bona fide business organizations filing to reorganize an ongoing
14 enterprise. 22 B.R. at 924. The court did not err in finding
15 that Debtor had not offered evidence or arguments sufficient to
16 establish the viability of his plan of reorganization. 30 F.3d
17 at 38. The court's findings are sufficient to establish cause
18 for dismissal of the case under § 105(a).

19 Nor did the court clearly err in determining that Debtor
20 would likely be unable to fund a plan from the settlement
21 proceeds, as Debtor contends he will do. The trustee in the
22 South Carolina cases has not objected to the \$5.2 million tax
23 lien held by the IRS and Debtor proffered no reliable theory upon
24 which the lien could be avoided.¹²

25
26 ¹²On appeal, Debtor contends that his "Statement of Financial
27 Affairs disclosed his 1996 debtor in possession Form 1040, which
28 contained an amendment to tax year 1993 eliminating the IRS pre-
petition claim." However, the record submitted on appeal does not

(continued...)

1 After reviewing the record in its entirety, we are not left
2 with a definite and firm conviction that the court erred. In re
3 Leavitt, 209 B.R. at 938. The court determined that the purpose
4 for which the petition was filed was not consonant with the
5 purpose of the Bankruptcy Code, and thus that its decision to
6 dismiss the case was proper.

7 B. False and Misleading Statements.

8 The court found Debtor made false and misleading statements
9 in his petition, under penalty of perjury, and indicated that it
10 would refer the matter to the State Bar of California.¹³

11 Debtor contends that the court's findings are in error
12 because he was entitled to amend his schedule under Rule 1009(a),
13 which permits the amendment of a voluntary petition, schedule or
14 statement "at any time before the case is closed." The omission
15 of his Santa Rosa case was "an oversight" which was cured by his
16 amended filing, and therefore, Debtor argues, it should be
17 excused pursuant to Rule 1009(a). While it is true that
18 amendments to a petition may be made freely, i.e., without leave
19 of the court, the fact that an amendment can be made does not
20 preclude a court from finding the initial omitted information to

21
22 ¹²(...continued)
23 contain the information Debtor describes. Issues raised in a
24 brief but not supported by argument are deemed abandoned absent
manifest injustice. Humble v. Boeing Co., 305 F.3d 1004, 1012
(9th Cir. 2002).

25 ¹³According to Debtor's disclosure statement, he passed the
26 February 2004 California bar exam and has satisfied all other
27 requirements to practice law in California, except that the
28 Committee of Bar Examiners has not yet reached a favorable
determination of moral fitness as set forth in Rule X of the
Rules Regulating the Practice of Law in California.

1 be indicative of bad faith. Further, the court can also consider
2 the timing of the amendment as indicia of bad faith. In this
3 case, it appears the amendment was spurred by the OSC issued by
4 the court. Finally, the court's consideration of Debtor's legal
5 background was not unreasonable. The court's findings regarding
6 the omission of the Santa Rosa case are not clearly erroneous.

7 As for the 1996 case, Debtor maintains that he did not fail
8 to disclose it but determined that the case had been consolidated
9 with another bankruptcy case taking place in the same court.
10 Therefore, he urges, it was not necessary to amend his petition
11 to reflect his South Carolina case. We agree with Debtor on this
12 narrow point, but for a different reason. As discussed above,
13 the wording on the petition form is such that technically Debtor
14 was not required to list the 1996 case. Therefore, the omission
15 of the 1996 case from the petition cannot be characterized as a
16 false and misleading statement. However, in light of our
17 analysis regarding the Santa Rosa case, the ultimate conclusion
18 of the bankruptcy court is not clearly erroneous.

19 C. Prohibition of Further Filings by Debtor.

20 Debtor argues that the court erred in prohibiting him from
21 filing another bankruptcy petition for 180 days. This issue has
22 become moot as well over 180 days have passed since the court
23 entered its order dismissing Debtor's case. Debtor is no longer
24 barred by the order from filing another petition, should he deem
25 that to be appropriate.

26 D. Dismissal of the Adversary Proceeding.

27 Debtor contends that the bankruptcy court erred in
28 dismissing a related adversary proceeding after Debtor had filed

1 a notice of appeal in this case. Presumably, though it is
2 unclear, Debtor is referring to Adversary No. 04-4139 which is
3 the adversary proceeding he filed against the judge in the Cooper
4 state court case, as well as the attorneys involved in that case.
5 This argument will not be considered by the panel since we do not
6 have jurisdiction to hear Debtor's challenge of the court's
7 separate order, filed August 13, 2004, dismissing the adversary
8 proceeding.

9 The bankruptcy court holds jurisdiction over an adversary
10 proceeding after dismissal of the underlying case. In re Lake
11 Tahoe Land Co., Inc., 12 B.R. 479, 481 (Bankr. D.Nev. 1981).
12 Debtor failed to file a notice of appeal in that proceeding, or a
13 motion to extend the time to appeal within ten days of the entry
14 of the Order, as required by Rules 8001 and 8002. Debtor's
15 challenge of that order is beyond the scope of this appeal and
16 beyond the jurisdiction of the panel. See In re Crystal Sands
17 Properties, 84 B.R. 665, 667 (9th Cir. BAP 1988) (an appellate
18 court has jurisdiction to hear an appeal only when a timely
19 notice of appeal has been filed).

20 CONCLUSION

21 Based on the foregoing, we AFFIRM.
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U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. NC-04-1311-SBrP

RE: WILLIAM JEFFREY GILLIAM

A separate Judgment was entered in this case on August 10, 2005.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$255 filing fee (effective November 1, 2003) and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy
Appellate Panel of the Ninth Circuit, hereby certifies that a copy
of the document on which this certificate appears was mailed this date
to all parties of record to this appeal.

By: Patti Ippolito

Deputy Clerk: August 10, 2005